No. 80-1152

In The

Supreme Court of the United States

OCTOBER TERM, 1980

ROCHESTER GAS AND ELECTRIC CORPORATION,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Appellee.

On Appeal From The Court of Appeals Of The State Of New York

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Rochester Gas and Electric Corporation ("Rochester") hereby replies to the Motion to Dismiss or Affirm of the Public Service Commission of the State of New York ("commission").

I

The Federal Questions Are Substantial

In addition to a substantial issue of due process, this appeal involves the *most* substantial of all federal questions: the right of free speech guaranteed by the First Amendment. This appeal raises the question of how First Amendment standards are to be integrated with rate regulation.

The question is one of wide-spread applicability. While of direct concern to every New York utility, utilities in other states are also subject to regulatory limitations upon their ability to communicate.[1] Nor are the principles raised in this appeal confined to state regulation or to electric, gas and telephone utilities; they are applicable to all governmental rate regulation.

The commission brushes aside the issues in this appeal as routine rate regulation. (Mot. p. 10.)[2] In so doing the commission implicitly asserts that it may deal with Rochester's right of speech in a manner identical to Rochester's property rights, contrary to the holdings of this Court. (J. S. pp. 20-21.) The commission makes it plain that it has not recognized, and, absent reversal by this Court, will not recognize the difference in rights.

This appeal raises a vital question: How are the standards required by the First Amendment to be accommodated within the rate-regulation process? (J.S. pp. 20-24.) It does not involve complex facts, or a difficult record. Rochester believes that the applicable principles have been expressed by this Court, but have not been applied in the circumstances raised in this appeal.

This appeal is different from *Laclede Gas Co. v. Public Service Comm'n*, ____U.S.____, 49 U.S.L.W. 3492 (No. 80-576, January 12, 1981). In *Laclede* the appellant suggested that disallowance of "goodwill" advertising expenses in setting rates is proscribed by the First Amendment. Rochester does *not* claim that the First Amendment prohibits the commission from limiting its

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[1] *E.g.: Pacific Northwest Bell Telephone Co. v. Davis*, ____ Or. App. ____, 608 P.2d 547 (1979); *Laclede Gas Co. v. Public Service Comm'n*, 600 S.W.2d 222 (Mo. Ct. of App., W. Dis't), *appeal dismissed*, ____ U.S. ____, 49 U.S.L.W. 3492 (1981). *Cf. Alabama Power Co. v. Alabama Public Service Comm'n.*, 359 So. 2d 776 (1978).

[2] References to appellee's Motion are cited herein as "Mot. p. ____"; references to the Jurisdictional Statement are cited as "J. S. p. ____"; and references to the Appendix to the Jurisdictional Statement are cited as "App. p. ____".

allowance for communication. Rochester agrees that the commission must be able to do so if rate regulation is to be effective.

Laclede did raise the reality that exclusion of communication expenses in setting rates is a limitation upon the right to communicate. Communication requires the expenditure of money, and the utility obtains money to pay expenses only to the extent provided for in the rates set by the regulatory body. (J.S. pp. 15-19.) But *Laclede* did not raise the question of how that reality was to be adapted to the important reality of rate regulation. The latter is raised precisely in this appeal. Upon the resolution of this question rests the reality of First Amendment rights for *all* entities subject to rate regulation.

The commission's refusal to comply with the due process requirement, that ratemaking determinations be based upon record evidence (J.S. pp. 25-31; point III, *infra*), raises a substantial federal question of critical importance to all such entities.

II

Free Speech Has Been Violated

The cornerstones of the commission's claim that its action is consistent with Rochester's freedom of speech are, first, an assertion that Rochester claims an absolute right to have unlimited amounts included in rates for communication, and, second, that denial of the means by which to exercise free speech is not a limitation of that right.

A. *"Unlimited amounts" are not at issue.*

The commission's apparent strategy is to convey the impression that only routine regulatory rejection of an attempt to impose excessive costs upon ratepayers is involved in this appeal. However, such is not the case.

The commission characterizes Rochester's position as contending that the First Amendment *requires* the commission to allow the amount of past communication expenditures in future rates (Mot. p. 9) or requires that the commission allow "unnecessary or unreasonably high expenses" (*ibid.*) or requires the commission to allow "unlimited amounts" (*id.* at 10). As stated *explicitly* in the Jurisdictional Statement (pp. 20, 23-24), Rochester claims no entitlement to an unlimited communication allowance and, on the contrary, specifically concedes that the First Amendment does not prevent the commission from limiting the amount allowed. But such a limit *is* a limitation upon Rochester's free speech and, as such, the commission must meet the standards of the First Amendment. (J. S. pp. 20-24).

The commission implies that it found some areas of Rochester's informational advertising program "unnecessary" (Mot. p. 9), to lack ratepayer benefit (*id.* at 10) or to consist of "image polishing" (*id.* at 10-11). However, the commission made no finding that any part of Rochester's communication program was unnecessary; both the commission staff (App. p. 205a) and the commission (*id.* at 35a-37a, 62a) disclaimed undertaking any such evaluation.[3] Similarly, there is no finding by the commission that any portion of the communications lack ratepayer benefit or consist of "image polishing."[4]

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[3]Further, the commission described the types of communication here at issue as "in the public interest and . . . a legitimate expense of doing business" and as "legitimate and indeed inescapable costs of doing business." (App. pp. 184a-185a.) In its brief to this Court in *Consolidated Edison Co. of New York, Inc. v. Public Service Comm'n*, ____U.S.____, 65 L.Ed.2d 319 (1980), the commission described the major part of these communications as an "obligation" of the utility (p. 24).

[4]Necessity or ratepayer benefit might be relevant to whether a limitation is *permissible*, but they do not affect the fact of limitation. And, to meet First Amendment standards, far more is required than merely implying lack of necessity or ratepayer benefit.

The commission infers that its approach to communication expenses is a reasonable short-cut to avoid evaluating Rochester's communication program. (Mot. p. 10.) This Court has held that neither reasonableness[5] nor regulatory expediency[6] will justify a limitation of speech. Further, Rochester has *not* suggested that the approach of a lump sum for communications, instead of item-by-item review, is impermissible. Rochester's complaint is that commission *implementation* of its approach failed to accept or meet its burden of showing that Rochester's historic level of expenditure exceeded the limits of reason.[7]

This Court has been explicit as to the standards for judging a limitation of First Amendment rights. The commission has not disputed its failure to meet those standards. That elementary failure raises a vital constitutional question of the extent and means by which those standards are applicable in rate regulation.

B. *Denial of the means to exercise a right is a denial of the right itself.*

The commission argues that its disallowance of Rochester's communication expenses is not a limitation upon Rochester's speech. Regardless of whether or not such a limitation is *permissible*, it is absurd to suggest that it is no limitation.

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[5]*Thomas v. Collins*, 323 U.S. 516, 530 (1945); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

[6]". . . the prospect of additional administrative inconvenience has not been thought to justify invasion of fundamental constitutional rights." *Carey v. Population Services International*, 431 U.S. 678, 691 (1977).

[7]In Rochester's immediately prior rate case, the commission described Rochester's expenditures for just *part* of these communications, which were equal to 0.2% of gross revenues (or *double* the amount allowed in this proceeding), as "modest" and "not unreasonable." *Rochester Gas and Electric Corp.*, 16 NYPSC 294, 309 (1976).

Rochester has dealt with this point quite explicitly (J. S. pp. 15-19), and will not repeat that discussion here.

The commission suggests there is no difference between a refusal to *give* a person the means to exercise a right and a refusal to permit a person to earn the means to exercise a right. It seems clear that there is a vast difference in the two situations and this Court has never equated them.

The commission suggests that to have allowed Rochester its communication expenses would have

> forced the ratepayers . . . to pay for the advertising in their rates . . . . the result is no different from forcing taxpayers to fund abortions so that those who cannot afford them are not deprived of their rights . . . . (Mot. p. 11.)

Public utilities are private corporations, albeit engaged in public service. *Munn v. Illinois*, 94 U.S. 113 (1877). They do not levy taxes, but charge for services. They do not collect payments from one customer to provide service to another. Ratepayers do not pay for poles or employees *or* advertising; ratepayers pay a just and reasonable charge for services provided.[8] *Board of Public Utility Comm'rs v. New York Telephone Co.*, 271 U.S. 23, 32 (1926). And, again, questions of excessiveness or forced payment would go not to the fact of limitation, but, at most, to the issue of whether that limitation was permissible under First Amendment standards.

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[8]Nor is there, as suggested by the commission (Mot. p. 12, n. 5), any issue of subsidization of speech by ratepayers. One might similarly argue that ratepayers "subsidize" Rochester's employees. *See also* J. S. p. 2, fn. 2.

Abood v. Detroit Board of Education, 431 U.S. 209 (1977) is irrelevant, quite apart from the lack of comparability between compulsory union dues and payments for service supplied. *Abood* held that it was "ideological activities *unrelated* to collective bargaining, for which such compulsion is prohibited." 431 U.S. 236 (emphasis added). Here all of the areas of communication involved are acknowledged by the commission to be service-related. (App. pp. 184a-185a, 200a-201a.)

The commission suggests (Mot. p. 12) that:

> A limitation on advertising expenses to be allowed in rates is no more a limitation on speech than any governmental restriction or program that lowers a company's earnings.

The commission has reinforced the point in our Jurisdictional Statement (p. 17). Here we are concerned with action directed specifically to speech — action intended and certain to limit the ability to communicate — not with programs, restrictions, or taxes of general application.

Any inclination to credit the commission's arguments should be disspelled by the misleading phraseology used in asserting (Mot. p. 12) identity of issues in this appeal and in *Southwestern Electric Power Co. v. Federal Power Comm'n*, 304 F.2d 29 (5th Cir.), *cert. denied sub nom. Alabama Power Co. v. Federal Power Comm'n*, 371 U.S. 924 (1962). Rochester responded to the same argument in the court below. *See* Appendix, hereto. *Southwestern* decided an issue of *accounting* jurisdiction and specifically *disclaimed* deciding the issue of allowability in rates of *political* advertising expenses. Here political advertising is not involved, and accounting is not at issue; here the issue is rate-making treatment.[9]

The commission's claim that its action does not limit Rochester's exercise of free speech is contrary to both logic and the decisions of this Court (J.S. pp. 15-19).

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[9]To be consistent with the commission's position *and* the facts, the first two sentences of this part of the commission's argument should have read (brackets for deleted words and italics for added words):

> The Commission has done nothing more than require that any expenditures over the allowance be [accounted for] *treated* as "below-the-line" expenditures — not chargeable to the ratepayers. The constitutionality of [treating] *accounting for* advertising expenses as a below-the-line expense was litigated over a decade ago . . . . (Mot. p. 12.)

The commission has reversed the key words.

C. *A policy statement does not satisfy the burden of a clear and compelling showing.*

The commission makes clear that, to sustain its limitation, it relies on its Statement of Policy. Both parties have dealt with evidentiary support in the due process point in their arguments. While we respond in point III to the matters raised on this issue by the commission, the difference in showings required by free speech and due process should not be overlooked.

Even if one could construe the record to provide substantial evidence, in no way can it be construed to provide the clear and compelling showing required by the First Amendment. The commission has converted a generalized announcement of anticipated policy into a binding substitute for evidence. The First Amendment has surely become frail if it is so easily evaded.

III

Due Process Has Been Denied

The commission suggests: "Rochester would have this Court examine the ratemaking process" on the issue at hand and reverse the findings of the courts below "as to procedures required under" New York law. (Mot. p. 15.) Rochester has not challenged procedures *required* by New York law; Rochester has challenged the action of the commission as complying with the requirements of neither free speech nor due process.

The commission confirms that it relies solely upon its Statement of Policy (Mot. pp. 10, 15-16) and, perhaps, the undisclosed "evidence" claimed to be the basis thereof (*id.* at 16). Rochester will not repeat its showing (J.S. pp. 28-29, 30-31) that such reliance is unlawful.

The commission, in a footnote, attempts to distinguish *Pacific Gas & Electric Co. v. Federal Power Comm'n*, 506 F.2d 33, 38-39

(D.C.Cir. 1974). (Mot. p. 16.) *Pacific Gas* is precisely on point: a general statement of policy is not a substitute for evidence.

The Statement of Policy does claim that, in response to the request for comments, "[o]ver 300 responses . . . were received" (App. p. 174a), but the substance thereof is neither disclosed nor discussed (*id.* at 184a-187a). Service of comments on other persons was not provided for and no opportunity for responsive comments was provided (*id.* at 196a).

Most important, in its Notice requesting comments, regarding the types of communication which comprise between 59 and 81 percent of the expenditures at issue in this appeal, the commission explicitly stated: "We do not solicit comments . . . ." (*Id.* at 200a.)

On its face, the Statement of Policy reflects only generalized policy concerns. (*Id.* at 184a-187a.) There is no indication of the claimed (Mot. p. 16) *investigation* of the *expenditures* by all utilities in general, and certainly no indication of any investigation of *Rochester's* particular needs or expenditures. The latter is the issue and the need for the commission to *specifically* address that issue was made acute in light of its completely opposite finding in the prior Rochester rate case (n.7, *supra*).

The Statement of Policy *itself* made it clear that, as to the *amount* allowed in its lump sum approach, it merely "announces what the agency seeks to establish as policy" (*Pacific Gas, supra*):

> On the basis of past practice, this allowance will, *in all probability,* range between 1/10 and 1/25 of one percent of operating revenues . . . . *It will be determined individually for each company, in its next or pending rate case* . . . . (App. p. 186a, emphasis added.)

Only *later,* in the rate case, did the commission convert this general policy statement into a substantive rule of law.

A general policy statement is neither evidence nor a substitute for evidence (J. S. pp. 28-29), and the undisclosed, non-record

"evidence" claimed to underlie that policy statement may not lawfully sustain the commission's determination (*id.* at 30-31).

If the commission's action is constitutional, then due process is no longer applicable to rate regulation.

CONCLUSION

If gross disregard of First Amendment rights and flagrant denial of due process do not raise substantial federal questions, then what does? The interrelationship of First Amendment standards with the ratemaking process should only need to be addressed once by this Court, but it is essential to both the regulated and the regulator that it be addressed.

The only summary disposition of this appeal which would be appropriate is reversal of the decision below.

Respectfully submitted,

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February, 1981

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of February, 1981, three copies of the foregoing Brief Opposing Motion to Dismiss or Affirm were served upon the Public Service Commission of the State of New York by mail by depositing the same in a United States post office, first class postage prepaid, addressed to Peter H. Schiff, Esq., General Counsel, Public Service Commission of the State of New York, Agency Building No. 3, The Governor Nelson A. Rockefeller Empire State Plaza, Albany, New York 12223. I further certify that all parties required to be served have been served.

Dated this 17th day of February, 1981, at Rochester, New York.

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APPENDIX

APPENDIX

Portions of the Briefs to the New York Court of Appeals On the relevance of *Southwestern Electric Power Co. v. Federal Power Comm'n*, 304 F.2d 29 (5th Cir.), *cert. denied sub nom. Alabama Power Co. v. Federal Power Comm'n*, 371 U.S. 924 (1962)

From Brief of the Public Service Commission of the State of New York, pages 24-25:

The Commission has done nothing more than require that any expenditures over the allowance be accounted for as "below-the-line" expenditures — not chargeable to the ratepayers. The constitutionality of treating advertising expenses as a below-the-line expense was litigated over a decade ago in *Southwestern Electric Power Co. v. F.P.C.*, 304 F.2d 29 (CA5), *certiorari denied sub nom. Alabama Power Co. v. F.P.C.*, 371 U.S. 924 (1962). In that case the United States Court of Appeals for the Fifth Circuit upheld a determination by the Federal Power Commission that expenses of advertising in favor of private power and in opposition to public power were to be categorized as political and thus most likely paid for by the stockholders rather than the consumers. The utilities in that case contended that classifying the expenses as political and thereby rendering them, at least presumptively, non-recoverable in rates, infringed on the utilities' right of free speech. The Court rejected that argument, stating (304 F.2d at 47):

> . . . We are unable to find here any basis for an argument of this character. As we have noted, nothing in the order prohibits or restrains the petitioners from publishing or republishing these or any other similar advertisements. Their freedom of speech or freedom of action in this area are not in any manner limited. All that has occurred in this proceeding relating to keeping of accounts is to

> exercise the Commission's discretion as to where these expenditures should be entered and to do so in such manner as to indicate the views of the Commission that such expenditures should not be subsidized by the consumers who purchase the power; that those expenditures should be charged to an income account [*i.e.*, the stockholders].

From Reply Brief of Rochester Gas and Electric Corporation, pages 7-8:

Similarly, *Southwestern Electric* does not support the Commission. The issue — and the only issue — decided in that case was the *accounting* jurisdiction of the regulatory agency relative to *political* advertising. In the order being reviewed by the Court the Federal Power Commission had specifically stated:

> "Of course, the question of whether the rate payer or the shareholder shall ultimately pay these particular expenses must await rate proceedings under the Act, for an accounting classification matter of this kind does not involve determining the just and reasonable rates for the utility." 304 F.2d 38 (fn. 16).

Indeed, in the portion of the opinion quoted by the Commission (C.Br. 25) the Court, in rejecting the First Amendment arguments of the petitioners, held:

> All that occurred in this proceeding relating to keeping of accounts is to exercise the Commission's discretion as to where these expenditures should be entered .... 304 F.2d 47.

In this proceeding, not only are political expenditures not involved, but the issue is the opposite of that involved in *Southwestern Electric*. Contrary to the Commission's loose use of words the issue here does not involve the accounts in which the

communication expenses are to be entered;[7] here the issue is that which *Southwestern Electric* disclaimed deciding; whether the communication expense is to be paid for by the ratepayer. *Southwestern Electric* is no authority on that issue.

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[7]The Commission asserts:

> The Commission has done nothing more than require that any expenditures over the allowance be *accounted for* as "below-the-line" expenditures — not chargeable to rate-payers. C.Br. 24 (emphasis added).

In point of fact, under the Commission's Uniform Systems of Accounts the expenditures at issue are properly accounted for in Account Nos. 911, 917 and 930.1 (A. 269[*]), all of which are "above-the-line" accounts. *Cf.* 16 NYCRR, Chap. II, Subchap. F, Art. 1.

[*See App. p. 204a.]